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No. 82-392

In the Supreme Court of the United States

OCTOBER TERM, 1982

MONEX INTERNATIONAL, LTD., AND FIRST NATIONAL MONETARY CORPORATION, PETITIONERS

v.

COMMODITY FUTURES TRADING COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the issuance of an administrative complaint by the Commodity Futures Trading Commission is "final agency action" reviewable pursuant to 5 U.S.C. 704.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 677 F. 2d 522.

JURISDICTION

The opinion and judgment of the court of appeals (Pet. App. 32) was entered May 3, 1982. On June 9, 1982, the court of appeals issued an order (Pet. App. 30-31) clarifying its opinion. The petition for a writ of certiorari was filed on September 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are engaged in the purchase and sale of contracts for precious metals, principally gold and silver coins and bullion (Pet. App. 2). Among the contracts that Monex International Ltd. (Monex) sells directly to the public are

gold and silver contracts that it broadly denominates as "forward contracts" (*ibid.*). First National Monetary Corporation (FNMC) offers similar contracts for sale, although it calls them "cash forward contracts" (*ibid.*). With either a "forward" or "cash forward" contract, the customer makes a minimum deposit of about 15% of the total price of the contract, plus any other applicable charges (J.A. 861, 1196).[1] Thereafter, if a customer's equity in a contract falls below a specified maintenance level, petitioners call upon the customer to provide additional maintenance funds to restore the contract equity to a specified level (J.A. 861-862, 1196-1197). Customers may liquidate their contracts by effectuating offsetting transactions or, depending upon whether the contract is for the purchase or sale of metal, at maturity can either make or take delivery of the actual gold or silver coins or bullion (J.A. 862, 1197).

The Commodity Futures Trading Commission is charged, *inter alia*, with the responsibility of regulating "transactions involving contracts of sale of a commodity for future delivery * * *." 7 U.S.C. (Supp. IV) 2. These "futures" contracts are subject to extensive administrative oversight, and may be executed only on regulated exchanges designated by the Commission as contract markets. 7 U.S.C. 6h; *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, No. 80-203 (May 3, 1982), slip op. 4-7 & n.14. On August 8, 1979, the Commission issued administrative complaints against Monex (J.A. 860-866) and FNMC (J.A. 1195-1201) alleging that their "forward" and "cash forward" contracts were contracts for future delivery of a commodity (J.A. 862, 1197), and charging that petitioners had violated the Commodity Exchange Act by executing or consummating such contracts other than by or through a member of a contract

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[1] "J.A." refers to the joint appendix in the court of appeals.

market, in violation of Section 4h of the Act, 7 U.S.C. 6h (J.A. 862-863, 1197-1198). The complaints were issued pursuant to Sections 6(b), 6(c), and 8a(3) of the Commodity Exchange Act, 7 U.S.C. 9, 13b, and 12a(3).

In their answers to the administrative complaints, petitioners generally denied the allegations against them and raised numerous affirmative defenses. One of their principal contentions was that their so-called "forward" and "cash forward" contracts were not futures contracts under Section 4h of the Act, 7 U.S.C. 6h, but rather were "leverage" contracts subject to Section 19 of the Act, 7 U.S.C. (Supp. IV) 23.[2] Prior to the filing of the administrative complaints, a rulemaking proceeding had been commenced to consider the Commission's proposal to regulate "leverage" contracts under Section 19 of the Act as contracts for future delivery (J.A. 1547-1548 n.1).[3] Petitioners moved the

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[2]The Act provides for alternative approaches to regulation of leverage contracts under Section 19, 7 U.S.C. (Supp. IV) 23. Subsections 19(b) and (c) permit the Commission to govern leverage contracts through a regulatory scheme designed solely for leverage transactions, 7 U.S.C. (Supp. IV) 23(b) and (c). Subsection 19(d), however, provides that if the Commission determines that any leverage transaction is a contract for future delivery within the meaning of the Act, such a transaction shall be regulated in accordance with the generally applicable provisions of the Act governing futures trading. 7 U.S.C. (Supp. IV) 23(d).

[3]That rulemaking proceeding concerned solely the Commission's proposal to regulate certain "leverage" contracts as futures contracts under the Act (J.A. 1547-1548 n.1) and did not purport to define "leverage" contracts (see 44 Fed. Reg. 13494 *et seq.* (1979)). The Commission intended to make that determination on October 1, 1982 (J.A. 1547). The Commission, however, is currently subject to reauthorization review by Congress. Among other matters under consideration by Congress is the appropriate regulatory scheme for "leverage" contracts. See 128 Cong. Rec. H7523 (daily ed. Sept. 23, 1982); H.R. Rep. No. 97-565 (Pt. 1), 97th Cong., 2d Sess. 22-23, 108-114 (1982); S. Rep. No. 97-384, 97th Cong., 2d Sess. 51-53, 177-178 (1982). Accordingly, the Commission's rulemaking efforts with respect to "leverage" contracts have been deferred pending the conclusion of congressional reauthorization proceedings.

administrative law judge for a stay of the adjudicatory proceedings against them pending completion of the Commission's "leverage" contract rulemaking proceeding. The administrative law judge granted this request on October 2, 1980. The Commission, however, on May 1, 1981, reversed the stay of the ALJ on interlocutory appeal (J.A. 1552). The Commission rejected the ALJ's implicit conclusion that the "forward" or "cash forward" contracts sold by petitioners are "leverage" contracts of the type involved in the Commission's rulemaking proceeding (J.A. 1551). The Commission concluded that this assumption was erroneous because "the entire theory of the administrative complaint is that [petitioners'] 'cash forward contracts' are contracts for future delivery, not leverage contracts" (*ibid.*). The Commission therefore vacated the ALJ's stay of the administrative proceedings and remanded the matter for further hearings before the ALJ.[4]

Before the administrative hearings in this matter could proceed, however, petitioners filed the present litigation. On November 18, 1981, FNMC sought injunctive and declaratory relief in the United States District Court for the Eastern District of Michigan against any further prosecution of the administrative proceeding. Monex filed a similar complaint that same day in the United States District Court for the Central District of California. Each complaint essentially presented the same contentions previously raised in the administrative proceedings. Both district courts

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[4]On remand, the Chief Administrative Law Judge, who was previously assigned to the case, recused himself and the matter was assigned to another ALJ. This recusal and substitution forms the basis for many of petitioners' general allegations of procedural unfairness (Pet. 8, 16). Petitioners have repeatedly claimed, without substantiation, that they will not receive a fair hearing before the ALJ (*ibid.*). On December 17, 1981, the district court, without hearing any evidence on the subject, apparently adopted petitioners' assertions on this issue (see Pet. App. 25).

issued temporary restraining orders against continuation of the administrative proceedings, and the California action was transferred to the Michigan district court.[5]

On December 17, 1981, after oral argument but without hearing any testimony, the district court rendered a decision from the bench that preliminarily enjoined the Commission from prosecuting the administrative proceeding instituted against petitioners. The district court held that the Commission's issuance of the administrative complaints was a final agency decision to proceed against petitioners by adjudication rather than by rulemaking. The court therefore concluded that the issuance of the complaints was final agency action reviewable under Section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704 (Pet. App. 19). The district court further held that the Commission had abused its discretion in deciding to proceed against petitioners by adjudication rather than by rulemaking (*id.* at 23-24). The district court then concluded, after merely cataloguing the "allegations" (*id.* at 25) and "claims" (*ibid.*) advanced by the petitioners, that there was a "possibility" that the petitioners would suffer irreparable harm if the administrative proceeding was not enjoined (*id.* at 26). The district court's oral opinion was later incorporated into a formal preliminary injunction entered on December 29, 1981.

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[5]The original temporary restraining order entered by the Michigan district court was appealed to the United States Court of Appeals for the Sixth Circuit. By order dated December 10, 1981, the court of appeals stayed the order of the district court. The court of appeals concluded that the temporary restraining order impermissibly exceeded the 20-day limitation of Fed. R. Civ. P. 65(b), and was therefore an appealable preliminary injunction (28 U.S.C. 1292(a)(1)). The injunction was stayed because of the district court's failure to support the injunction with findings of fact and conclusions of law as required by Fed. R. Civ. P. 65(d).

By order dated March 31, 1982, the court of appeals vacated the preliminary injunction entered by the district court (Pet. App. 29). In an opinion issued May 3, 1982, the court explicated the reasons for its actions (Pet. App. 1-10). The court of appeals concluded that the mere filing of an administrative complaint is not a "final agency action" reviewable in federal court under 5 U.S.C. 704 (Pet. App. 5-6), and rejected the contention that the complaints in this case were so plainly beyond the Commission's power that a court should intervene at the outset to declare the proceedings a nullity (*id.* at 6). The court reasoned that it could not assume, as the district court apparently had (*id.* at 6-7), "that the administrative agency will act illegally, that a retroactive order will be entered punishing [petitioners] unfairly and that they will be harmed irreparably before they can obtain judicial review and redress" (*id.* at 6). The court noted that any contrary findings by the district court "are clearly erroneous and wholly unsupported by the present record" (*id.* at 7). As for petitioners' arguments that the Commission must proceed by rulemaking rather than adjudicatory proceedings, the court of appeals correctly concluded that the " 'choice made between proceedings by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administra-[tive] agency' " (*id.* at 9, quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947)). The court of appeals denied petitioners' subsequent motions for a stay of its mandate and decision.[6]

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[6]As noted by petitioners (Pet. 13), the Commission did file a petition for rehearing with the court of appeals. The Commission, however, did not argue that the court of appeals' holding "was incorrect" (*ibid.*). The primary purpose of the petition was to clarify a somewhat confusing statement contained in the court's opinion. In the administrative proceedings and before the district court, petitioners had argued that their "forward" and "cash forward" contracts were "leverage" contracts controlled by the Commission's "leverage" contract rulemaking. In its

Following the issuance of the court of appeals' decision, the ALJ notified the parties that he intended to proceed with the administrative hearing. By April 21, 1982, all parties agreed to a hearing date of June 14, 1982. Despite last minute efforts by petitioners to prevent the administrative hearing,[7] the administrative proceeding progressed in an orderly fashion. The hearing commenced as scheduled on June 14, 1982, and concluded on July 2, 1982; the parties are now in the process of filing post-hearing briefs and proposed findings of fact.

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opinion the court of appeals inadvertently equated "forward" and "cash forward" contracts with "leverage" contracts (Pet. App. 4), and the Commission sought clarification of this point so that petitioners could not contend in the administrative proceeding that the court of appeals had held that their contracts were indeed "leverage" contracts. On June 9, 1982, the court of appeals issued an order (Pet. App. 30-31) clarifying this ambiguity, explicitly stating that the legal character of petitioners' contracts "is an issue to be resolved in the administrative adjudicatory proceeding" (*ibid.*).

[7]On June 1, 1982, petitioners unsuccessfully applied to Justice O'Connor for a stay of the court of appeals' mandate and March 31, 1982 Order (No. A-1041). Petitioners thereafter presented their stay application to Justice Rehnquist. Pursuant to the practice of the Court, the application was referred for consideration by the entire Court, and was denied on June 28, 1982. On June 10, 1982, four days before the administrative proceeding began, a hearing was held before the district court at petitioners' request to consider their motion for summary judgment. Petitioners contended, as they do in this Court (see, *e.g.*, Pet. 3-4), that the term "contracts of sale of a commodity for future delivery" in Section 2(a)(1) of the Act, 7 U.S.C. (Supp. IV) 2, and the proscriptions of Section 4h of the Act, 7 U.S.C. 6h, are unconstitutionally vague and overbroad. The district court denied the motion in an oral opinion rendered from the bench at the conclusion of the hearing. The court concluded that it was "clear[] that the opinion of the Sixth Circuit Court of Appeals * * * mandates the denial of summary judgment" because of the "numerous and broad authority for the proposition that a Court should not rule on the constitutionality of a statute or agency until the agency has in fact acted" (Civ. No. 81-74572, E.D. Mich., June 10, 1982 Tr. 25-27). On October 7, 1982, the district court rendered an opinion from the bench granting the government's motion to dismiss without prejudice.

ARGUMENT

The opinion of the court of appeals is in complete accord with the decisions of this and other federal courts that have addressed the proper scope of judicial review of administrative action. Further review by this Court is therefore unwarranted.

1. The court of appeals held that the Commission's mere issuance of an administrative complaint is not reviewable under Section 10(c) of the Administrative Procedure Act. That statute provides for review of any "final agency action." 5 U.S.C. 704. The court of appeals' conclusion is mandated by this Court's recent unanimous decision in *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232 (1980) (*Socal*), which held that the issuance of an administrative complaint by the Federal Trade Commission does not constitute final agency action reviewable under 5 U.S.C. 704.

Petitioners attempt to distinguish *Socal* by arguing that "*Socal* does not prohibit judicial review of a claim that the agency is acting in excess of its authority by filing an administrative complaint" (Pet. 21). The distinction is without merit. As the court of appeals noted (Pet. App. 5), a similar argument was made and rejected in *Socal*. The claim in that case "was that the agency acted beyond its delegated authority in issuing the complaint because it had not made necessary precomplaint findings" (*ibid.*). The Court rejected that argument in *Socal* partly because judicial intervention "denies the agency an opportunity to correct its own mistakes" and results in inefficient and perhaps unnecessary piecemeal review. 449 U.S. at 242-243.

There is, however, a more fundamental concern behind this Court's rejection of the argument pressed by petitioners. The Court rejected the jurisdictional argument raised in *Socal* and renewed by petitioners here because "every

respondent to a Commission complaint could make the claim that Socal had made. Judicial review * * * should not be a means of turning prosecutor into defendant before adjudication concludes." *Socal, supra,* 449 U.S. at 242-243. The pragmatic considerations justifying that conclusion are amply illustrated by the course of events in this case. By pursuing their claim that the Commission exceeded its authority in issuing an administrative complaint against them, petitioners were able to thwart the commencement of an administrative hearing for nearly seven months.

The arguments raised by petitioners, moreover, are hardly unique to this case. Acceptance of petitioners' contentions would provide respondents in adjudicatory proceedings with immediate access to judicial review of any administrative complaint on the ground that the agency should be required to proceed instead by rulemaking procedures. If agencies were required to defend actions in federal court on that issue as a matter of course, the administrative process could not function as required by Congress. See *Socal, supra,* 449 U.S. at 242-243. See also B. Schwartz, *Administrative Law* § 45, at 115 (1976) (acceptance of such jurisdictional arguments "will readily enable those subject to administrative authority unduly to delay investigations into their affairs").

Furthermore, contrary to the assertions of petitioners (Pet. 21-23), none of the cases cited by them establish a conflict between the circuits regarding the proper application of *Socal* to the facts in this case. Petitioners' reliance on *United States* v. *Cabrini Medical Center,* 639 F. 2d 908 (2d Cir. 1981), is misplaced. In contrast to the present litigation, *Cabrini* was an action *commenced by the government* to enforce an administrative subpoena duces tecum in a pending investigation of employment practices at the Cabrini Medical Center by the Department of Health and Human Services (HHS). *United States* v. *Cabrini Medical Center,*

497 F. Supp. 95 (S.D.N.Y. 1980), rev'd, 639 F. 2d 908 (2d Cir. 1981). The medical center defended against enforcement of the subpoena on the ground that HHS lacked statutory authority to conduct the investigation. 497 F. Supp. at 96; 639 F. 2d at 909. In that procedural context, it was entirely within the authority of the district court and court of appeals to consider whether the matter under inquiry exceeded the "investigatory power" of the administrative agency. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-653 (1950). In *Cabrini*, the court concluded that the HHS subpoena exceeded the investigatory authority of the agency because the hospital's receipt of federal funds was not in any way related to the hospital's employment practices—which were the target of the investigation.

In contrast to subpoena enforcement cases like *Cabrini*, *Socal* and the present case both involve actions brought by private parties to enjoin pending administrative adjudicatory proceedings. The doctrines of administrative finality and exhaustion of administrative remedies clearly apply in these actions. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). The court of appeals' application of *Socal* to the facts of this case does not conflict with *Cabrini*, because the imperatives of finality and exhaustion of administrative remedies that dictated the results in *Socal* and this case simply were not controlling in the context of a government subpoena enforcement action.[8]

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[8]Moreover, unlike the claims raised in *Cabrini*, petitioners here have challenged only the discretion of the Commission to proceed against them by administrative complaint rather than by rulemaking (Pet. 16). They cannot seriously argue, as the contestants did in *Cabrini* (639 F. 2d at 910), that the Commission lacks statutory authority to file the complaints. Even the district court in this case acknowledged this distinction: "there is no question the Commission has authority to issue the type of complaint it is [*sic*] issued" (Pet. App. 17).

The other cases relied upon by petitioners are also unavailing. *Touche Ross & Co.* v. *SEC*, 609 F. 2d 570, 577 (2d Cir. 1979), does not support petitioners' claim that the "lack of agency authority to order an administrative proceeding" (Pet. 22) is judicially cognizable prior to completion of the administrative proceeding. In *Touche Ross* the court of appeals was faced with the question whether the SEC was statutorily authorized to issue and enforce rules of practice. Because the issue was "one of purely statutory interpretation" (609 F. 2d at 577), the court concluded that it would review the appellants' claim that the SEC lacked authority to promulgate and enforce such rules of practice. Significantly, the court concluded that appellants must exhaust their administrative remedies before obtaining judicial review of their other claims, "including their claim that the Commission is acting with bias and will not afford them a fair hearing in accordance with due process" (609 F. 2d at 582). Petitioners here do not raise pure issues of statutory construction, but instead question the discretion of the Commission to proceed in this case by adjudicatory proceedings rather than by rulemaking. Judicial resolution of this issue necessarily depends upon facts that can only be developed during the challenged administrative proceeding. Significantly, petitioners also rely heavily upon assertions of bias and denial of due process—issues that the court in *Touche Ross* specifically reserved for judicial review after complete exhaustion of administrative remedies (609 F. 2d at 582).

Jewel Companies, Inc. v. *FTC*, 432 F. 2d 1155 (7th Cir. 1970), likewise does not support the broad proposition for which it is cited by petitioners (Pet. 22). That case held that a court could immediately review whether a Commissioner of the Federal Trade Commission properly had construed his discretion in voting to issue an administrative complaint (432 F. 2d at 1159). Apart from the fact that this holding

has no direct relevance to petitioners' claims, the result reached by the court in *Jewel* is highly doubtful in light of this Court's subsequent decision in *Socal, supra*. One of the principal grounds for the decision in *Jewel* was the concern that unless the decision to issue the complaint was reviewed prior to the administrative adjudication, the issue would escape review entirely. 432 F. 2d at 1159. However, this Court when faced with a nearly identical argument in *Socal* rejected such concerns as a basis for immediate judicial review. *Socal, supra,* 449 U.S. at 244-245.

Gulf Oil Corp. v. *DOE,* 663 F. 2d 296 (D.C. Cir. 1981), is cited by petitioners to support their assertion that *Socal* does not "preclude judicial intervention to review the procedural fairness of an ongoing adjudicatory proceeding" (Pet. 22; footnote omitted). Petitioners, however, fail to describe the type of extraordinary circumstances present in *Gulf Oil* that were found to justify intervention into the DOE's ongoing adjudicatory proceeding. In *Gulf Oil* there was substantial and uncontroverted evidence that Department of Energy employees deliberately destroyed numerous documents in order to prevent their falling into the hands of their opponents during discovery. Petitioners have made no showing of such extraordinary misconduct in this case. Accordingly, *Gulf Oil* provides no basis for disregarding the ordinary rule that errors in the administrative proceedings can adequately be cured on judicial review. See 663 F. 2d at 311, citing *Socal, supra,* 449 U.S. at 245.[9]

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[9]Similarly, the court in *Amos Treat & Co.* v. *SEC,* 306 F. 2d 260 (D.C. Cir. 1962), intervened in an ongoing administrative proceeding only because one of the Commission members had previously served on the prosecuting staff of the SEC at the time the administrative action was commenced. The court concluded that these circumstances, where one man had served as prosecutor, judge and jury, resulted in a fundamental denial of due process, justifying extraordinary judicial intervention (306 F. 2d at 266). Petitioners simply have failed to show similar egregious circumstances justifying judicial intervention in this case.

The court of appeals properly refused to intrude upon a non-final, on-going administrative proceeding. Petitioners have cited no case that conflicts with this unremarkable and eminently sound ruling.[10] Further review by this Court is therefore unwarranted.

2. Contrary to petitioners' assertions (Pet. 13-14), the decision of the court below has little relevance to the issues decided by the Ninth Circuit in *Ford Motor Co.* v. *FTC*, 673 F. 2d 1008 (1981), petition for cert. pending, No. 82-24,[11] and *Patel* v. *Immigration and Naturalization Service*, 638 F. 2d 1199 (9th Cir. 1980). Unlike the present litigation, those cases involved review of agency adjudications where the court had final agency decisions, including complete factual administrative records, before it. Accordingly, those cases were in a procedural posture that permitted review of the issue whether the agencies had abused their discretion by imposing a certain rule of law through adjudication rather than rulemaking. The court below recognized that this distinction between *Ford* and *Patel* and the present case "is crucial" (Pet. App. 10). Because *Patel* and *Ford* involved review of final action, the court "did not have to speculate

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[10] *Reader's Digest Association* v. *FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981), also cited by petitioners (Pet. 23), offers them absolutely no support. There the district court specifically held that the Federal Election Commission is authorized to pursue an administrative investigation, without judicial interference, into whether its authorizing statute was applicable to the activities of the Reader's Digest Association (509 F. Supp. at 1214). The Commission here is similarly entitled to determine whether petitioners have violated the provisions of the Commodity Exchange Act without premature judicial interference.

[11] In July 1982, the Solicitor General filed a petition for certiorari in *Federal Trade Commission* v. *Francis Ford, Inc.*, *supra*. The question presented by that petition is whether an order of the Federal Trade Commission is unlawful because the agency failed to proceed by rulemaking rather than adjudication. The petition in *Ford*, however, may be moot. See Reply Brief for the Federal Trade Commission, No. 82-24.

about the facts, the nature of the industry, the administrative standard to be applied, the remedy or sanction to be imposed and the effect on non-parties similarly situated" (*ibid.*).

By contrast, in this case there has not been any final Commission adjudication of the complaint against Monex and FNMC, and therefore there is no decision against which the standards set forth in *Ford* and *Patel* or any other judicial opinion can be applied. Indeed, prior to a final Commission adjudication, there is no basis to conclude that the Commission's decision will be adverse to petitioners. Moreover, even assuming, *arguendo*, as petitioners assert, that *Patel* and *Ford* establish that agencies must proceed by rulemaking rather than adjudication where the administrative action "would * * * change existing law and have widespread application" (Pet. 13-14), the court of appeals correctly concluded that such a test cannot be applied until after completion of the challenged administrative proceeding. It would be impossible for a court to determine, before the fact, whether the adjudicatory proceedings in this case will change existing law or have widespread application.[12]

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[12]In this case, for example, the Commission could conceivably conclude that petitioners' "forward" and "cash forward" contracts are not "futures" contracts, thus leaving the law applicable to this case essentially unchanged. A conclusion that petitioners' "forward" or "cash forward" contracts are "futures" contracts, furthermore, may have no widespread significance. This case, therefore, does not present the issues decided in *Patel* and *Ford*. Accordingly, there is no need to hold the present petition pending this Court's consideration of the petition in *Ford*. Whatever the eventual outcome of the *Ford* litigation, it is simply inapplicable in this case until the completion of the administrative proceedings against petitioners.

Thus, even assuming that *Patel* and *Ford* state a correct proposition of law, the cases do not justify the judicial intervention sought by petitioners here.[13]

3. Petitioners' claim that certiorari should be granted to prevent the Commission from proceeding with "a presumptively illegal administrative adjudication" (Pet. 23) is entirely unfounded. The Commission's decision to proceed against petitioners by means of an adjudicatory proceeding is not "presumptively illegal." To the contrary, the choice between rulemaking and adjudication is committed to the reasonable discretion of administrative agencies, and is presumptively valid. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-295 (1974); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765-766, 772 (1969); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 201-203 (1947). In *SEC* v. *Chenery Corp.*, *supra*, 332 U.S. at 203, the Court held that "[t]here is * * * a very definite place for the case-by-case evolution of statutory standards," and the "choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."

Applicants do not respond to these well-settled propositions of administrative law, but merely cite the lower court rulings in *Patel*, *supra*, 638 F. 2d at 1199 and *Ford*, *supra*, 673 F. 2d at 1008. As explained above, however, these cases

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[13]In an attempt to create the appearance of an administrative "record" against which the standards of *Ford* and *Patel* could be applied, petitioners ask the Court to accept, as adjudicated, a host of assertions of fact and law (see, *e.g.*, Pet. 2-3, 5-8, 14 n.10, 15 & n.11, 16). The vast majority of those assertions, however, have never been adjudicated in the administrative forum. Indeed, many of them remain in dispute in the administrative proceeding. Nor could the district court's opinion (Pet. App. 11-28) be reasonably construed to have made any such findings of fact or law. Significantly, petitioners cite no record or other authority for their assertions.

do not justify the judicial intervention sought by petitioners at the very outset of the administrative proceedings in this case.[14]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1982

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[14]The final issue tendered by petitioners for review is what they term the court of appeals' "radical[]" departure from the usual course of review in reversing the district court's preliminary injunction (Pet. 25). This issue clearly does not merit the attention of the Court. The court of appeals, after careful review of the record in the district court, concluded that the district court erred in holding that the issuance of an administrative complaint constituted reviewable final agency action under the Administrative Procedure Act (Pet. App. 5-6), and further found no evidence of irreparable injury or other procedural irregularity requiring judicial intervention into an ongoing administrative proceeding (*id.* at 7-10).

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